MEANS AND ENDS

1.

At first sight the Hart/Fuller-debate seems to revolve entirely around the question whether law can be regarded a purposive activity or not. Hart criticises Fuller for being too much in love with the notion of purpose. He wishes this romance 'would settle down to some cooler form of regard'. Fuller replies that Hart makes 'too little of purpose' and blames him for treating 'purposive arrangements as though they served no purpose'.

Viewed in these simple terms, the controversy seems to boil down to the question to what extent law can be said to serve a purpose. It is not surprising then that legal theory is commonly regarded a pastime for those who have nothing better to do. Here we have two eminent theorists, weighing the amount of 'purpose' they allow to play a role in law, whereas any law-student knows that people constantly talk of legal regulation as a means to implement certain policies and ideals. Whereas Fuller seems to labour the obvious, Hart's position seems downright nonsensical.

Fortunately, this apparent triviality is only the result of polemics. It never was Hart's intention to deny that law can achieve 'purposes'. Of course it can. He only wants to stress that those purposes should be regarded as extra-legal. Equal treatment of women or tax-reduction are substantive aims, to be debated as moral and political matters and to be decided upon by politicians. Law can be used as a means to implement those extra-legal purposes, but that does not turn law itself into a moral entity. The legal arrangements, designed in order to achieve these aims, are morally neutral. Whether these arrangements are efficient or not is therefore not a moral, but a technical matter. That is why Hart keeps stressing that law, although it can contribute to the realization of ultimate values, is not an ultimate end or value itself.

Hart's argument remains close to the Neo-Kantian assumptions held by Hans Kelsen and Max Weber, according to whom the craft of legal officials is essentially a technical one. Whereas politicians should decide on the ends to be pursued, the activity of lawyers is reduced to debating on how to reach those ends in the most efficient way. At the basis of the separation of law and morals is the Neo-Kantian distinction between means and ends. The discussion about the ends is regarded as essentially a moral and political one, in which no rational agreement about the truly desirable ends can be reached, whereas the choice of means is viewed as a technical matter. Rationality is limited to the selection of means as the best or most efficient way to reach a given end.

Viewed in this light the debate between Hart and Fuller is not about whether law is purposive or not, but about the nature of these purposes. Are they extra-legal or do they form part and parcel of law itself? Is law permeated by those moral and political ends or is it a versatile and neutral instrument to be

---


used for achieving just any purpose politicians come up with?

2.

Fuller’s position in this debate is unequivocal. He repeatedly emphasizes that law cannot be used in order to achieve any purpose and he is genuinely appalled by Hart’s comparison with the poison-maker, who achieves morally pernicious ends with the utmost skill and efficiency. There is something in law which renders it essentially different from poison-making and other technical crafts, Fuller maintains.

But what exactly that difference is, he has not fully worked out. On the contrary, the unwary reader might be led to believe that Fuller remains close to the Neo-Kantian framework in which technical means are distinguished from substantive ends. The substantive aims are said to belong to the sphere of ‘external morality’: they are ‘objects of legislation’\(^4\). And as objects of legislation they should be regarded as distinct from the process of legislation itself.

The suggestion that substantive aims are to be distinguished from technical means is further reinforced by Fuller’ favourite analogy, that of carpentry. Just as the carpenter has to respect some technical guidelines in order to construct a solid table, the legislator has to keep in mind the eight requirements, devised by Fuller, in order to be a successful legislator. According to Fuller, laws should be general, they should be promulgated, not retroactive, understandable, not changed overnight, not impossible to comply with, internally coherent, applied by rules that are stable, clear and coherent, and administered by persons who can be held accountable and who are consistent. At first sight, the much repeated phrase that law is a ‘purposive activity’ does not appear to set Fuller apart from legal positivists. Like them he distinguishes firmly between the activity itself (carpentry, legislation) and the product that results from that activity (a table, tax-reduction).

On the basis of such a superficial reading of Fuller’s argument, it would seem then that the controversy between Fuller and Hart is neither about whether law is purposive, nor about the nature of those purposes. Both conceive law as a means that can be used in order to achieve external purposes. The only difference between the two is that whereas Hart regards the guidelines for successful craftsmanship as ethically neutral, Fuller maintains that they together form an ‘internal morality’. To the extent that these requirements are successfully met, law represents a moral value in itself, Fuller asserts. The work of the prudent legislator is not merely of outstanding technical quality, but can somehow be evaluated as a moral achievement as well.

Fuller, however, omits to argue why the eight requirements, unlike other rules of craftsmanship, are to be regarded as moral standards. In his reply to critics\(^5\), he even argues the other way round by conceding that seven out of those eight requirements\(^6\) can be regarded as purely technical ones, merely furthering expediency, not morality. It all seems to depend on the context in

\(^4\text{Fuller, op.cit. p. 96.}

\(^5\text{Ch. V. of the 2nd edition of the ML.}

\(^6\text{An exception is the requirement that there should be congruence between official action and declared rule.}
which the craft of rule-making is conducted. In the context of the top-bottom relationships exemplified by what he calls 'managerial direction' these seven requirements are morally neutral\(^7\). Only in the domain of 'law', defined by Fuller as a framework for the horizontal relations between free citizens, and as such distinguished from managerial direction, these requirements gain moral significance.

This argument, however, does not support his theory that the requirements are to be regarded as an -internal- morality. On the contrary, it seems to strengthen Hart's view that taken by themselves these requirements are morally neutral. Instead of arguing that law owes its moral qualities to the eight requirements, Fuller argues here that the eight requirements owe their moral quality to law.

3.

One might object that we should not take this failure too seriously. Does it really matter whether the eight standards for good legislation are to be taken as moral or as technical guidelines? Is it really so important to decide whether law owes its moral qualities to these requirements or not? I think it is. For if one rejects the positivist tenet that law and morality should be separated, but fails to argue why law represents a moral value in itself, there seems to be only one alternative left. That alternative consists in arguing that law owes its moral significance to the fact that it is a tool in the service of moral values. This view is adopted by John Finnis, who sets out to develop a substantial, non-procedural theory of natural law. I don't think that Finnis's option is satisfactory. On the contrary, it clearly reveals the pitfalls awaiting anyone who does not come to terms with the nature of Fuller's requirements and it is in this sense that Finnis's theory is instructive. Let us, therefore, take a closer look at Finnis's theory\(^8\).

The most conspicuous element of Finnis's proposal is his unexpected but fundamental agreement with Hart's criticism of Fuller. Finnis explicitly agrees with Hart that Fuller's requirements are morally neutral and that they are compatible with 'evil aims'\(^9\). Obviously, this agreement works out in opposite directions. Whereas Hart thinks that Fuller claims too much, Finnis asserts that Fuller did not do enough in order to show that law is intrinsically connected to morality.

In order to understand Finnis's position, it should be noted that he shares the Neo-Kantian assumptions of legal positivism and makes a firm distinction between technicity and morality. That leads him to distinguishes two kinds of ends of law: technical ends and moral ends. Technical ends are the resolution of disputes, certainty and predictability. The orientation towards these technical ends turns law into a technical tool:

---

\(^7\) Fuller, ML, p. 208-9

\(^8\) A more extensive analysis of Finnis's theory can be found in my book The Disintegration of Natural Law Theory: From Aquinas to Finnis, Brill, Leiden, 1998. Parts of sections 3, 4 and 5 are taken from Ch. X.

Lawyers’ tools of trade (...) are means in the service of a purpose sufficiently definite to constitute a technique, a mode of technical reasoning. The purpose (...) is the unequivocal resolution of every dispute (...) which can be in some way foreseen and provided for\textsuperscript{10}.

This technical aspect of law as a set of tools in order to bring about a given end implies that its vocabulary should not be seen as a mere translation of moral discourse. Law is not simply a set of moral precepts plus the force of sanctions\textsuperscript{11}. Since law's overall aim is predictability and certainty, its vocabulary acquires a different form:

Legal reasoning (...) is (at least in large part) technical reasoning -not moral reasoning. Like all technical reasoning, it is concerned to achieve a particular purpose, a definite state of affairs attainable by efficient dispositions of means to end\textsuperscript{12}.

In order to achieve these technical ends, the legislator should be guided by what Finnis calls the 'Rule of Law' which comprises no more than the eight requirements devised by Fuller\textsuperscript{13}. Finnis regards these requirements as technical requirements.

Unlike the legal positivist, however, Finnis does not leave it at that. The technical ends of law are subordinated to moral ends. The technical aims of predictability and certainty are in turn means to some further moral end. Law should not only strive for predictability and certainty, but also aim at the common good. Law has not only a technical but also a moral aspect. Finnis claims that in order to understand law correctly, we should take into account both aspects, and see that the technical aspect is subordinated to its moral aspect:

(...) this quest for certainty, for a complete set of uniquely correct answers, is itself in the service of a wider good which, like all basic human goods, is not reducible to a definite goal, but is rather an open-ended good (\ldots)\textsuperscript{14}.

A hierarchy is introduced here. Fuller's requirements are instruments for the technical aims of predictability and certainty. And these technical aims are in turn instrumental in achieving the 'open-ended' or 'wider good'.

4.

What then is that wider good? Finnis introduces here the traditional concept of the 'common good', which he defines as:


\textsuperscript{11}Finnis, NLNR, p. 281.

\textsuperscript{12}Finnis, in: George, op. cit. p. 142.

\textsuperscript{13}Finnis, NLNR, pp.270-1.

\textsuperscript{14}Finnis, in George, op. cit. p. 142.
(...) a set of conditions which enables the members of the community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s) for the sake of which they have reason to collaborate with each other (...) in a community\textsuperscript{15}.

Time and again Finnis stresses that the Rule of Law (Fuller's requirements) are subordinate to the common good. According to Finnis the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good\textsuperscript{16}.

Consequently, we should not always give priority to the Rule of Law. After having outlined that the Rule of Law falls short of the common good, Finnis argues that it is sometimes necessary to depart from the Rule of Law, 'temporarily but sometimes drastically'. According to Finnis, the written constitution is not a 'suicide-pact'. In extreme conditions, true 'statemanship' is required\textsuperscript{17}. Since stability and certainty are in the service of a 'wider good', it is sometimes necessary that these virtues should be sacrificed in order to achieve that wider good.

These remarks are consistent with Finnis's hierarchical picture of means, technical aims, and moral aims. Yet, they are puzzling if one tries to combine them with Finnis's definition of the common good as a set of conditions, enabling citizens to pursue the values for the sake of which they co-operate with each other. If we understand the latter term as a set of enabling conditions, the Rule of Law seems to be of vital importance in creating the desired climate. Instead of writing that the Rule of Law does 'not secure even the substance of the common good', it would have been more appropriate to say that the Rule of Law is the substance of the common good.

Apparently, Finnis's concept of the common good is wider than the above-quoted definition, although in NLNR one looks in vain for a more substantial concept. However, in a recent article\textsuperscript{18}, Finnis introduces a concept of the common good which can more easily be reconciled with his view that it should prevail over the Rule of Law. There, he distinguishes two concepts of the common good: an instrumental one and a non-instrumental one. The instrumental definition is the one we have met so far. It is conceived of as a set of enabling conditions. The non-instrumental definition of the common good, on the other hand, is not regarded as a climate in which individual citizens can choose for themselves which values they want to pursue. Rather, it can be identified with (one) of the ultimate values Finnis discerns. These ultimate values ('basic goods', in Finnis's terminology) are: life, play, knowledge, religion, friendship, aesthetic experience and practical reasonableness. These are all

\textsuperscript{15}Finnis, NLNR p. 155.

\textsuperscript{16}Finnis, NLNR p. 274.

\textsuperscript{17}Finnis, NLNR p. 275.

values to be pursued for their own sakes and should not be seen as means to a further end.

Such a non-instrumental common good for instance can be ascribed to a community of religious believers. Their shared aim \textit{consists} in the participation in one of the basic goods: religion. The same applies to friends: their shared aim is friendship, to be enjoyed for its own sake, and not with an eye to some external aim. If there were such an external purpose, friendship is not understood in the proper meaning of the term.

If we interpret Finnis's common good of the NLNR in this non-instrumental sense, we can see why Finnis thinks that the Rule of Law does not secure even the 'substance of the common good' and why the common good is regarded as 'wider' than the good which is guaranteed by the fulfilment of Fuller's requirements.

5.

If Finnis's subordination of the 'technical' requirements of the Rule of Law can only be defended on the basis of a non-instrumental version of the common good, the question arises what such a common good can consist in. What exactly is that 'wider good' which is thought to be more important than the Rule of Law? Which of the basic goods should be selected as top-priority? 'Friendship', 'knowledge' or 'religion'?

Finnis does not supply an answer. This is not surprising, for it is his view that the basic goods or ultimate values are all equally and intrinsically valuable. They are ends-in-themselves, to be valued for their own sake. As such, they are incommensurable. He clings to this thesis because he maintains the (Neo-Kantian) assumption that one ultimate aim (e.g. happiness) would reduce the moral debate on ends into a technical calculation of means. To develop a substantial, non-instrumental concept of the common good as the participation in one basic good would be at odds with the plurality of these incommensurable values.

Finnis is therefore reluctant to define a more substantial common good. It should be the outcome of public debate. The problem is: how can such a debate be conducted if the ultimate values are thought to be incommensurable? Ideally, a society should seek to realize all seven basic goods, but it cannot be denied that every society, even an affluent one, sooner or later has to decide on which of these goods should be given priority. The issues to be decided upon refer to a \textit{particular conception} of the common good.

Finnis stresses that such a choice is to a large extent an arbitrary affair. The basic goods are all equally valuable. They should not be evaluated in terms of 'happiness' as the utilitarians would have it, but they should be chosen for their own sakes, as values which are irreducible to some further aim. That is why, ultimately, neither individuals nor collective bodies can adduce any rational arguments in favour of their ultimate choice. That choice is therefore \textit{pre-moral}\footnote{Finnis, in George, \textit{op. cit.} 1992, p. 148.}.

(...) in the life of a community, the preliminary commensuration of rationally incommensurable factors is accomplished not by rationally determined
judgements, but by *decisions* (choices).^20\footnote{Ibid.}

These 'decisions', however, cannot be checked by the requirements of the Rule of Law. We have seen that as 'mere' technical standards these requirements are regarded as subservient to a wider good and should give way to that wider good if need be. This is, I think, a potentially dangerous view. Values such as security, predictability, freedom and equality^21\footnote{Note that 'freedom' and 'equality' do not figure on Finnis's list of the basic goods. They are seen as values realized by the -subordinate- Rule of Law.} can ultimately be sacrificed to an arbitrary decision on what counts as the common good.

6.

The excursion into Finnis' theory enables us to see the problems inherent in a natural law theory which is based on the Neo-Kantian assumption that there is a sharp dividing line between technical means and moral ends. Although the dichotomy is a fruitful assumption for the legal positivist who can use it as a foundation for his view that law and morals should be separated, it is devastating for anyone who claims that law is somehow connected with morality. There, it leads to a bifurcation of law into a 'technical' and a 'moral' aspect. These cannot be sensibly linked, except by asserting that the technical aspect is 'subordinate' to the moral one. But also on that moral level, the dichotomy causes havoc: the common good itself is also regarded as either means or end, as either instrumental or non-instrumental. The schism between means and ends in themselves runs through Finnis's entire theory.

Theoretically unsatisfactory as these assertions might be, their practical implications are even less convincing. Legal procedures and arrangements, though implementing and ensuring co-operation among free citizens, ought to be sacrificed in the name of a wider good which can no longer be the object of rational debate, but is the product of subjective and emotional preferences and decisions. The upshot of it all is that we ought to obey the law^22\footnote{Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory', in: Finnis (ed.), *Natural Law*, Aldershot, 1991, Vol. II.} not in virtue of the fact that it safeguards security or certainty (these are 'mere' procedural qualities), but because it serves an -unspecified- wider good.

Clearly, these problems are absent in Fuller's work. He abstains from any discussion concerning 'ultimate values' or the common good. Yet, by asserting that his natural law is only 'procedural' and not substantial, we have seen that he makes himself vulnerable to the opposite critique: the charge that in effect he remained too much at a technical level and has not proven at all that law and morality are intrinsically connected.

Obviously, this criticism only applies if one shares the Neo-Kantian dichotomy between means and ends. It is only on the basis of that assumption that Fuller appears as a mere technician. Fuller can therefore only hope to defend himself by undermining that dichotomy.
That, indeed, this is the kind of argument Fuller had in mind can be gathered from the views expressed in his essay 'Means and ends'\textsuperscript{23}. This highly interesting essay provides, I believe, the framework for Fuller's thesis that law represents a moral value in itself. It enables him to connect law with morality without committing himself to the view that law should be sacrificed to a higher moral good. It is here that Fuller tries to overcome the dichotomy between technical means and moral ends\textsuperscript{24}.

According to Fuller, the vocabulary in which ends are seen as 'ultimate' and means as 'merely instrumental' is thoroughly misleading. In order to gain a clearer insight in human activities, and especially in the system of law, we should abstain from that distinction. Law, Fuller argues, is not a mere instrument in order to bring about order and justice. Law is a form of order itself. And he approvingly quotes Oakeshott's remark that freedom is not brought about by the availability of the procedure of Habeas Corpus; but consists in that procedure\textsuperscript{25}.

Consequently, he criticises the limited view of rationality immanent in both the utilitarian and the Neo-Kantian conceptual framework. It suffers, according to Fuller, from an underestimation of the amount of freedom involved in the choice of means, and an overestimation of what technicians can do and calculate in order to fulfil the given end:

Curiously, though the technicians capable of devising the apt means for social ends are never identified, it seems to be assumed that their competence is unlimited.\textsuperscript{26}

As Fuller points out, even if one has a decided aim in mind, the most difficult dilemmas can present themselves. To reflect on 'means' is not a matter of calculation only.

Conversely, the selection of means thoroughly affects the choice of ends to be pursued. There is no clear-cut division between an 'end-setter' and a 'means-specialist'. Taking the example of equality, Fuller emphasizes that means constitute the meaning of ends:

Until we find some means by which equal treatment can be defined and administered, we do not know the meaning of equality itself.\textsuperscript{27}

I believe that these insights are valuable in refuting both Hart's and Finnis's criticism. The essay could have been a starting-point for the argument


\textsuperscript{24}Fuller ascribes this dichotomy to the dominance of utilitarianism, but it figures prominently in Neo-Kantianism as well.

\textsuperscript{25}Fuller, ME, p. 60.

\textsuperscript{26}Fuller, ME p. 56.

\textsuperscript{27}Fuller, ME, p. 62.
that substantive aims cannot be regarded in isolation from the legal arrangements and that the latter are therefore not morally neutral.

However, in his reply to critics, Fuller only occasionally hints at the means/end-distinction. He confines himself to remarking that

(...) what is means from one point of view is end from another and (...) means and ends stand in a relation of pervasive interaction.\(^{28}\)

But of course, this loose remark does not suffice to discard a way of thinking which is so dominant in both utilitarianism and Neo-Kantianism. What is more, Fuller's promising enterprise is marred by several elements that appear to strengthen rather than weaken the means/end-dichotomy. As I noted above, his distinction between internal and external morality seems to reintroduce the distinction between technicity and morality. His analogy with carpentry further reinforces the interpretation that the requirements are to be regarded as 'merely' technical guidelines for legislation. And finally, his persistence that his natural law is only 'procedural' seems to strengthen the interpretation that Fuller conceives of law primarily as a tool, a means to the external 'substantive aims' to be decided upon by politicians. It is no wonder then that the implications of Fuller's essay are not always fully appreciated.

Yet, if there is an escape from the Neo-Kantian strait-jacket in which both legal positivism and Finnis's natural law theory force themselves, it should be found here, in Fuller's hesitant attempts to develop a pragmatist theory of law. Before such a theory can be developed, however, some groundwork should be done. Let us examine which issues should be on the agenda of anyone interested in such an enterprise. Which elements in Fuller's argument should be highlighted, and which interpretations should at all cost be avoided?\(^{29}\)

8.

The first issue that should be addressed is a further analysis of the term 'activity'. We should, I think, make the most of Fuller's argument that law is essentially an activity and to work out what he understood by that phrase. Fuller emphasizes that law is not a 'piece of inert matter'.\(^{30}\) It is an activity, an 'enterprise', namely of 'subjecting human conduct to the governance of rules'. The advantage of this view, according to Fuller, is that it allows for a gradual evaluation. An activity can be carried out more or less successfully.\(^{31}\) We are not compelled to regard law as something which 'is' or 'is not' there.

But what exactly is an activity? Fuller's analogy with the carpenter suggests that he regards this activity in the technical sense, as producing,

\(^{28}\) Fuller, ML, p. 197.

\(^{29}\) To ask these questions is not the same as 'reconstructing' Fuller's theory. Cf. Peter Read Teachout, 'The Soul of the Fugue: An Essay on Reading Fuller', in: *Minnesota Law Review*, Vol. 70, no.5, May 1986, p. 1088, who correctly regards such efforts at reconstruction as 'platitudeinizations' of Fuller's theory.

\(^{30}\) Fuller, ML, p. 123.

\(^{31}\) Fuller, ML, p. 122.
making. It seems then that he regards activity as a *means* to a further end (a table, a law). And it is in this sense that Fuller is commonly interpreted. Jeremy Waldon, for instance, distinguishes "two levels of instrumentality". At the first level one asks whether the governance of rules is the best institutional means to serve our social and political goals. At the second level, one inquires into the attributes such a tool must possess in order to be efficacious. Waldron interprets Fuller as having raised the second question\(^{32}\).

I don’t think that such an interpretation is justified. For does it make sense to regard activities as ‘means’? It is true that we might think of cleaning dishes as a means to get clean dishes, or of manufacturing shoe laces as a means to get shoelaces. But it seems as if only such routine-jobs can wholly be understood in terms of the specific goals they are to bring about.

With most activities, however, it is extremely hard to determine the goal. Is painting a means to express one’s inner feelings? Or a means to examine the effects of light? Or is it a means to decorate bare walls? The answer depends on how one regards painting. Unlike routinized activities, painting cannot be understood in terms of its goals, but it is the other way round: the selection and attribution of goals depends on a prior understanding of the activity itself.

One might object to this argument that although the goals of most activities might be hard to determine, one can still think of them as external to the activity itself. The complexity of activities such as ‘painting’ would not imply that in the final instance they cannot be seen as instrumental to a further goal.

I think that this view is too simple. Take for instance the activity of writing. Writing letters to attract extra funding or to apply for a job may be understood in simple instrumental terms, but what about writing articles like this one? Most students assume, when it comes to writing, that they have to think it all out before they can engage in the process of writing. Usually they end up with frustration: they never seem to succeed in ‘thinking’. The reason for that is that they suffer from the misunderstanding that writing is a ‘means’ to ‘conveying one’s thoughts’. It is not. It is in the process of writing that you discover what you want to write about.

Does this imply that we should think of writing as a means to thinking? Not quite. Although writing is a means to thinking, one cannot write anything without having *some* previous idea of what you want to write about. It seems then that thinking is also a means to writing. The problem here is that it is impossible to decide whether writing is a means to thinking or thinking a means to writing. It depends on one’s perspective whether writing is means or end. Most of the time the two go together. Writing *is* thinking.

This is probably what Fuller meant when he wrote that ‘human aims and impulses’ move in circles of interaction. We eat to live and we live to eat. We love that we may be loved, and we want to be loved that we may love freely\(^{33}\).

---


\(^{33}\) Fuller, ME, p. 54.
It is difficult, if not impossible, to conceive of activities such as writing or painting as simple means to an end. Does that suggest that we should take the opposite view and regard these activities as 'ends-in-themselves'? This is Finnis's view, at least with respect to activities that can be conceived as, to use his peculiar terminology, 'participations' in the seven basic goods. 'Painting' as a participation in 'aesthetic experience' should be seen as an end-in-itself. It is irreducible to some further aim. Painters who merely paint for the sake of some external purpose have missed 'the point' of painting, according to Finnis.

I find this position even less convincing than the instrumentalist view. Finnis might have thought that painters only paint for the sake of painting, but this view probably indicates that Finnis himself never painted. What applies to writing, also applies to painting. It is true that painting cannot be regarded as the means to get a picture. Neither can painting be understood as the simple reproduction of a ready-made image in one's mind. But that does not imply that painting is an aimless activity. One does not paint at random.

Usually, the starting-point is some vague guiding idea about the end-product. The first sketch then generates new problems or new ideas. On the basis of these new ideas one proceeds, only to find out that the next step generates the next problems, and so on. One proceeds in a tentative manner, at each step adjusting the original plan. Far from having no aim at all, each stage of producing a canvas presents its own problems, the solution of which can be understood as aims to be reached.

The fact that painting can be seen as a continuous process of trial and error does not imply that the artist can explicitly formulate the series of successive problems to be solved or that he can indicate why certain solutions turn out to be errors. The best illustration of what is going on is furnished by the film made of Picasso at work. We see a canvass undergoing rapid and fundamental changes, while we hear Picasso lamenting: 'now I am going wrong', or 'this is a real mess'. Finally, the whole canvas, full of corrections and blurred spots, is removed. Then Picasso starts afresh on a new and empty canvas and within a quarter of an hour, a picture appears at which Picasso comments: 'now I got it all right'.

An purely instrumentalist interpretation of painting would only apply to this last quarter of an hour; then indeed a ready-made image is painted. But that image resulted from a messy process which can more aptly circumscribed by Fuller's 'circles of interaction'. The successive aims that present themselves to the painter only arise when one actually engages in painting. They are not 'given' from the outset and cannot be regarded as separated from the activity. But neither can the activity be understood as unrelated to any aim whatsoever, as Finnis seems to think, and to be undertaken purely for its own sake.

Of course, it is possible to give a more charitable interpretation of Finnis's view. We might say Finnis had merely intended to argue that painting should not be regarded as a means to external purposes, such as happiness, or success, or money. We might assume that aims internal to the activity should be distinguished from external purposes, and that only the latter exercise their 'perverting' influence.

I don't agree, however, with the view that such external purposes would undermine the intrinsic worth of the activity. On the contrary: if I am commissioned to paint a portrait, or to paint in a certain style, (or to write something for a volume on Fuller) the vast array of possible courses of action is
narrowed down. I am therefore compelled 'to make the most' of the remaining possibilities within the given framework. And that may open up avenues that would otherwise have remained closed to me. External constraints usually enhance, rather than diminish, creativity.

That is why Dewey thought that ends are indispensable for action. Strictly speaking, ends are not ends at all, but means. They direct our actions:

Men do not shoot because targets exist, but they set up targets in order that throwing and shooting may be more effective and significant.\textsuperscript{34}

It seems to me that whether these targets are set up by customers or by myself does not fundamentally matter, as long as they are effective in guiding the activity. Activities have value not because they are ends-in-themselves but because of the complex and manifold ways in which they are directed to and generate by themselves a series of ends.

10.

One might want to rescue Finnis's theory by stressing the importance of the distinction between 'making' and 'doing', between what Aristotle called 'techne' and 'praxis'. One might argue that there is an important difference between activities which aim at the production of things, and activities which result, not in things, but in other activities. We might think of 'playing', 'talking', 'deliberating' or 'sustaining friendships' as such practical activities. One might argue that although productive activities can never be regarded an end-in-itself, practical activities should be regarded in Finnis's sense, as activities with an intrinsic value and irreducible to a further aim.

At first sight these activities are indeed harder to conceive as 'tools' or 'means' than productive activities. There may be mothers who merely engage in playing with their child because they want to educate the poor child, there may be people who only talk when they want to convey a particular message, but they can be considered as, indeed, having missed the 'point' of playing and talking.

But like productive activities, this resistance to be defined as mere means does not imply that these practical activities should be regarded as ends-in-themselves only. 'Play' might be one of Finnis's basic goods, but as any child knows, games are funnier if you can win or lose. And if my baby would not occasionally reward me with a smile, I would not spend so much time playing with him. The various targets and ends enhance rather than diminish the intrinsic value of activities.

Just as with productive activities, there is nothing to be gained by classifying these activities either as means to an end or as an end in themselves. Most activities are both at the same time. Whether one classifies them as one or the other is a matter of perspective. The perspective determines the kind of 'end' that is attached to an activity. Psychologists may regard my playing with the baby as an important means to achieve 'bonding', but surely this aim is not a motive for me to engage in play. I only want to have a nice time or to be

rewarded with smiles.

In short, from the point of view of the actor, no end can be discerned as isolated from the activity itself. There is only an 'end-in-view' as John Dewey called it: the most immediate consequence that one likes to bring about. And that end serves as a means to direct our actions.

The same applies to the prime example of praxis: moral deliberation. Also here, Dewey's concept of 'end-in-view' is important. There are no ends 'outside-and-beyond' which form the ready-made starting-point for moral deliberation. No one sets out, as Plato would have it, to reach the 'Good'. In choosing between different courses of action one is not guided by an 'ultimate end' but by the most immediate foreseen consequences. The choice for a particular action usually lead to a plurality of effects which in turn give rise to renewed deliberation. Deliberation is experimental and tentative, proceeding from one end-in-view to the other.

Of course, one may evaluate someone's moral life as a lifelong quest for 'honesty' or 'justice', and moral deliberation as a means to that end, but such an evaluation is carried out post hoc and from an external point of view. It does not enhance our understanding of what someone does if he is deliberating on something. The instrumentalist version of this activity is as far removed from the actual process and just as trivial as the understanding of 'writing' as a means to 'a book'.

Neither, however, is it plausible to regard deliberation as an end-in-itself. Finnis's view that 'practical reasonableness' is a basic good in itself disregards the obvious fact that we do not engage in deliberation for its own sake, but because we are confronted with different courses of action between which we want to choose.

If we regard moral deliberation, the highest form of 'praxis', in the way proposed by Dewey, we cannot avoid the impression that there are striking parallels with what I remarked above concerning technical activities such as painting or writing. Both technical and practical activities seem to proceed in the same way. The first end-in-view gives rise to action, which in turn offers new problems, which direct further action, and so on. They are all tentative, or 'experimental' as Dewey called it, proceeding from one end-in-view to the other.

The similarities between 'making' and 'doing' raises the question why we should cling to that familiar Aristotelian distinction between techne and praxis. Aristotle introduced this distinction because he thought that both kinds of activities embodied different means-end-relationships. He assumed that technical activities can be regarded in isolation from their products whereas practical activities are constitutive of the outcome.

As we have seen, there is no basis for this assumption. Not all technical activities are routine-jobs, in which means (the process of producing) can be viewed in isolation from the ends (the products). Rather, there is a continuum. At one extreme we find routinized activities which can wholly be understood in

---


terms of their products, at the other extreme we find activities in which means and ends cannot be separated at all. One may wonder whether there are activities that can unequivocally be located on either of these extremes. Most activities find themselves somewhere in between: writing an application-letter is more routinized than writing poetry. Hand-made tables are different from manufactured ones; exactly this difference indicates the different positions occupied by carpentry and manufacture on that continuum.

The same applies to praxis, the domain of activities which do not aim at products but at other activities. At the one extreme the ends are relatively simple and ‘given’, at the other extreme the ends only arise during the process of deliberation itself. Just as with technical activities, practical activities are usually to be located somewhere in between. Deliberating on the most profitable investment, although not entirely a routine-job, is a more straightforward activity than deliberating on moral matters. Finnis's view of sustaining friendship as an end-in-itself may be a lofty ideal, but most of us quickly give up if the relationship turns out to be a one-sided affair with nothing in return. (But this does not turn friendship into a matter of ‘calculation’ only.)

In both techne and praxis the separation of means and ends, of activities and their outcome, is a gradual affair, depending on the particular activity at hand. There is no dividing line between praxis and techne, in the sense that there is a sharp means/end distinction in the latter, which is absent in the former.

Instead of distinguishing between techne and praxis, it is more adequate to distinguish between activities which can wholly be described and understood in terms of their goals (such as writing an application letter) and activities which can be said to proceed in a tentative way, generating its own new problems and solutions (such as writing philosophy).

What does that imply for the activity of ‘subjecting conduct to the governance of rules’? It seems to me that there is no unequivocal answer to that question. Instructions and regulations issued by employers to employees can be regarded in relatively simple instrumental terms and are to be located at one extreme of the continuum. At the other end, however, we find complex forms of rule-making, such as developing a new body of environmental law. Environmental legislation cannot only be regarded as a means to reduce pollution. Rather, in drafting these laws, all sorts of unexpected problems arise, which call for redefinitions of concepts such as liability and property. The solutions arrived at may in turn affect other branches of law, which may give rise to problems of compatibility and consistency, etcetera.

In short, rule-making, just like ‘writing’, covers the whole continuum. It may be a simple or a complex activity, a routine-job or a creative enterprise. And most forms of rule-making are to be located somewhere in between. That is why the analogy with carpentry is misleading. It is not misleading because carpentry is a ‘technical’ craft whereas rule-making is a ‘practical’ art37, but because carpentry occupies only one specific position on the continuum, whereas rule-making covers the whole range.

37This is the argument raised by Francis J. Mootz III, ‘Natural Law and the Cultivation of Legal Rhetoric’, in this volume.
Does this imply that we might translate Fuller's distinction between managerial direction and legislation into the terms suggested by this continuum? Can we say that managerial direction is a routine-job and legislation a much more complex and creative activity? I don't think so. The introduction of new traffic-rules can be a rather straightforward and routinized job. On the other hand, managerial direction, especially in large organisations, is not as straightforward as Fuller seems to assume, but involves complex forms of decision-making. And this activity can be just as 'creative' and tentative as environmental legislation. In a famous study organisational sociologists pointed out that one should not think of decision-making as an orderly progression from a certain well-defined problem to a solution. Rather, various problems, choices and solutions present themselves, which are later attached to each other in a rather arbitrary way\(^{38}\). This description fits well with my description of what happens in complex creative activities. There is no reason to introduce a sharp distinction between managerial direction and law-making.

The fact that legislation can be a complex activity does not imply, however, that it can never be regarded in instrumentalist terms. That some tax laws are designed in order to spread income or to diminish air-pollution goes without saying. But it is an unnecessarily foreshortened view. Legislation cannot entirely be understood in terms of these goals.

This is all the more true for those ends and goals which express certain values, such as 'certainty' or 'justice' or 'equality'. It is of course possible to reconstruct law as the quest for these values, but this is wisdom with hindsight. It is only after the fact that we might conceive of law as the means towards the realization of these ideals. Moreover, it is only from the point of view of the spectator that we can understand law in this way. Just as the psychologist may perceive my playing as a means to achieve 'bonding', the sociologist of law might gain insight by narrowing his perspective, selecting some goals to which law furnishes the means.

But once we adopt an internal point of view, it is at once clear that law can more adequately be understood in the terms used by Dewey to describe 'language'\(^{39}\):

Men did not intend language; they did not have social objects consciously in view when they began to talk, nor did they have grammatical and phonetic principles before them by which to regulate their efforts at communication. These things come after the fact and because of it. Language grew out of unintelligent babblings, instinctive motions called gestures, and the pressure of circumstance. But nevertheless language once called into existence is language and operates as language. It operates not to perpetuate the forces which produced it but to modify and redirect them. (...) In short, language when it is produced meets old needs and opens new possibilities.\(^{40}\)


\(^{40}\)Dewey, ibid. [*my emphasis*]
It is in this sense that we should interpret Fuller's phrase that law is a 'purposive activity'. We should not interpret its purposiveness as the conscious attempt to achieve some well-defined purposes. Such an interpretation does not do justice to the fact that law-making, although it can be routinized to some extent, is also a creative enterprise which proceeds from problems to unintended consequences, which in turn give rise to equally unforeseen new problems. The tentative way in which one proceeds from one 'end-in-view' to another is responsible for the fact that law acquires a dynamism of its own which cannot be understood in simple instrumentalist terms.

13.

I argued that there is no fundamental difference between techne and praxis. Both kinds of activities can be either routinized or creative. In both kinds of activities the means/ends-relationship can be a straightforward one, but it can also be complex.

The assumption that the distinction between techne and praxis is no longer relevant implies that there is no reason to distinguish between technicity and morality. It is in this way that we can make sense of Fuller's eight requirements and the debate whether these should be viewed as either moral or technical. Instead of emphasizing, unarguably, that these are to be regarded as moral standards, Fuller should have said that the whole debate whether they are technical or moral is redundant and misleading, since it starts from a false distinction between techne and praxis. Finnis and Hart are both misled by a distinction which is unsound.

Probably, however, such an answer would not have convinced these critics. They could have argued, and with some reason, that there is a difference between what Fuller called 'external morality', the substantive aims, and the eight requirements. Even if it is not possible to refer to the eight requirements as 'technical' ends and to substantive aims as 'moral' ends, as Finnis does, there seems to be an important difference between the two kinds of ends: there is a difference between drafting a law against discrimination and making sure that that rule is promulgated.

This is not denied by Fuller. He explicitly speaks of the eight requirements as having appeal 'to the pride of the craftsman'. Of course, this has been understood in the sense suggested by his analogy with carpentry: as technical rules of thumb. The picture we form of the eight requirements is, however, changed, once we realize that 'writing' is a better analogy than 'carpentry'. If we think of law as similar to language and of law-making as similar to writing, as a dynamic and tentative enterprise which can sometimes be routinized but more often not, it becomes clear that Fuller's requirements can better be understood as guidelines that range from simple grammar-rules to stylistic requirements.

In order to understand this comparison better, we should make use of Fuller's distinction between the 'morality of duty' and the 'morality of aspiration'. Should the requirements be regarded in the minimal sense as necessary conditions to speak of law at all (morality of duty) or should we take them as as

---

41 Fuller, ML, p. 43.
ideals, never to be reached but to which law should aspire (morality of aspiration)? Fuller's position is equivocal. On the one hand he writes that the inner morality of law embraces both the morality of duty and the morality of aspiration, but on the other hand he concludes that

the inner morality of law is condemned to remain largely a morality of aspiration and not of duty.

If we regard the requirements in the terms suggested by the comparison with writing, it is however clear that in the minimal sense the requirements can be compared to the rules of grammar (without which writing is rendered unintelligible), in their maximal sense they can be regarded as guidelines for eloquent or beautiful writing.

This comparison suggests that whether we should take them in the minimal or in the maximal sense not only depends on the moral qualities of the legislator or on the political régime. It also depends on the position a particular act of rule-making occupies on the continuum. If one is to state some simple rules for an employee, or to change the maximum speed at highways, we can take the requirement of generality in the minimal sense, as indeed no more than the demand that rules should be articulated in a general way. But if one sets out to reform tax law, the same requirement can also be seen in the maximal sense as requiring that the rules must apply to general classes, that no irrelevant distinctions should be made and that no proper names should be mentioned.

Fuller thought of the relation between the morality of duty and the morality of aspiration as a continuum:

In speaking of the relation between the two moralities, I suggested the figure of an ascending scale, starting at the bottom with the conditions obviously essential to social life and ending at the top with the loftiest strivings toward human excellence.

There is reason to believe that to a large extent Fuller's continuum runs parallel to the continuum I assumed to exist between routinized and creative activities.

This might also explain why Fuller thought that in the context of law the requirements gain a moral significance, which is absent in 'managerial direction'. He probably thought of the latter as a routinized activity, and indeed then the guidelines can be viewed as simple maxims. We have seen that this is probably a too limited view of managerial direction, but Fuller's view suggests that the requirements can indeed be taken as both grammar-rules and stylistic guidelines, depending on the job at hand and its position on the continuum between routine-jobs and creative activities. That is why Fuller's reply to Hart contained an analysis of the contexts of 'law' and 'managerial direction' rather than an explicit argument in favour of the moral qualities of the eight requirements. How we are to take these requirements is largely dependent on the tasks we set ourselves.

---

42 Fuller, ML, p. 42.

43 Fuller, ML, p. 43.

44 Fuller, ML, p. 27.
If it depends on the job whether the requirements should be taken as minimal requirements or as aspirations, there is no longer any reason to reserve for these requirements the special title of *inner morality*, to be distinguished from external morality.

Fuller has always been anxious to stress that distinction. In dealing with the above-mentioned requirement of generality, for instance, he explicitly asserts that the demand that rules should be general has nothing to do with the requirement that laws should not contain proper names, or that they should apply to general classes. The latter requirement, he writes, is a principle of fairness, and belongs to the sphere of external morality, whereas the simple demand that rules should be general belongs to the internal morality of law.\(^{45}\)

I find this boundary artificial. The requirement that law should be general can be taken in the minimal sense as a grammar-rule or in the maximal sense as a stylistic requirement. Taken in the minimal sense, it only requires that rules should be sufficiently generalized in order to be significant rules. In the maximal sense, the same requirement of generality is identical to the principle of fairness.

If we take the requirements in their maximal sense, as a morality of aspiration, they come very close to principles of ‘external morality’. And the broader one conceives of these requirements, the harder it is to fix a boundary between internal and external requirements. I think that such a reading largely agrees with Fuller’s ideas, who indeed acknowledges that there is ‘an indeterminate area in which the internal and external moralities meet’.\(^{46}\)

One might object to all this that we should not confound style and substance. Isn’t it true that horrid messages can be conveyed in florid styles? Isn’t it after all wise to distinguish external morality from internal guidelines?

I think that this objection is only justified with respect to routine-jobs. If one sets out to write business-letters the grammatical rules can be clearly distinguished from the substance. As I remarked before, in routine-jobs it is very well possible to establish a simple means/end-relationship in the sense that the means is independent from the end it seeks to bring about.

But not so with more creative activities. There, means and ends are so intricately connected that it is hard to find out which is the ‘means’ and which the ‘end’. In those activities style and substance cannot clearly be distinguished either. More often than not, I tend to correct my views not as a result of logical investigation, but simply because the text I have written lacks a certain rhythm or cannot be easily read. These faults invariably indicate that there is something wrong with the argument as well. Style serves as an alarm-system for mistakes in substance. With law it is no different. The lack of clarity of the racial laws of South-Africa, to mention Fuller’s example, serves at the same time as an indication that something is morally wrong as well.

Hart’s analogy with poison-making is therefore only partially adequate. It only applies to those forms of law-making which can indeed be regarded as

\(^{45}\)Fuller, ML, p. 47.

\(^{46}\)Fuller, ML, p.79.
routinized and for which only grammar-rules are needed. To a large extent, however, the importance of law is not that it is an efficient way of reaching targets, but precisely because -as a creative activity- it sets up targets in order to shoot better. Law is indeed ‘in quest of itself’.

This wisdom also enables us to see that Finnis pitches the moral value of law at the wrong level. Law has not only moral value in so far as it seeks to realize a predetermined common good. On the contrary, it is an important way of discovering what we should understand by that common good. That is why Fuller emphasizes that morality is to a large extent shaped by law. Just like other creative activities, law not only ‘meets old needs’ but also ‘opens new possibilities’. One of these possibilities is that it furnishes us a language in which debates on moral values can be conducted. If we subordinate law to morals, as Finnis proposes, we end up with the situation in which, indeed, there is no rational way to decide on the particular conception of the common good we want to pursue. Therefore, instead of maintaining that Fuller’s stylistic requirements should be sacrificed to higher values if need be, we should regard them as trustworthy guides towards forms of ‘human excellence’ that would otherwise remain beyond our reach.

---